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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 57

ARNOLD SCHLEICH, alias JOSEPH RING,
Petitioner,

vs.

JAMES W. BUTTERFIELD,
District Director of Immigration and Naturalization
at Detroit, Michigan,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed a judgment of the United States District Court for the Eastern District affirming a final order of deportation entered against the petitioner by the Board of Immigration Appeals on August 19, 1953.

OPINIONS BELOW

The opinion of the District Court is reported in 148 F. Supp. 44, sub. nom. *Schleich v. Butterfield.* The opinion of the Circuit Court of Appeals was entered February 14, 1958. Copies of both opinions are appended hereto.

JURISDICTION

The order of affirmance by the Court of Appeals was entered on February 14, 1958. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C. Sec. 1254.

QUESTIONS PRESENTED

1. Whether, upon the facts in this case and in the light of the standard of proof established by this Court's decision in *Rowoldt v. Perfetto,* 78 S. Ct. 180, the requirement of due process demands that Petitioner's case be remanded to the Immigration Service with leave to the Petitioner to present evidence bringing his case within the boundaries of the *Rowoldt* decision.

2. Whether, the statutory provision authorizing deportation of aliens for past membership in the Communist Party is unconstitutional on its face and/or as applied to the facts in this case, notwithstanding the decision in *Galvan v. Press,* 347 U. S. 522.

3. Whether the fact that the Special Inquiry Officer was an employee of and under the control of the Agency which instituted and conducted the proceedings against the appellant, was a denial of procedural due process, notwithstanding the decision in *Marcello v. Bonds,* 349 U. S. 302.

STATUTE INVOLVED

Title 8, Sec. 1251 of United States Code provides in part as follows in paragraph (a), (6) (C):

> "(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who * * * is or at any time has been, after entry, a member of any of the following classes of aliens: * * * aliens who are members of * * * the Communist Party of the United States; * * *."

STATEMENT OF THE CASE

Petitioner, a man at present 53 years of age, has resided in the United States for a period of thirty-five (35) years of which period 30 years have been spent in Detroit.

Petitioner was arrested for deportation on or about July 31, 1952, and a hearing before a Special Inquiry Officer of the Immigration Service was held in Detroit. At that hearing both the Immigration Service and the Petitioner were of the opinion that all that was necessary for the securing of an order of deportation under the above noted statute was a showing of alienage and voluntary membership, at some time, in the Communist Party. This interpretation was based on this Court's opinion in *Galvan v. Press, supra.*[1]

The Petitioner declined to testify at his deportation hearing.[2] There is no evidence in the record relating to any

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[1] See opinion of Board of Immigration Appeals rendered January 3, 1958, in *Matter of G—*, file No. 4-524774.

[2] The transcript of Petitioner's deportation hearing was introduced as Respondent's Exhibit 1 in the proceedings before the District Court and has been ordered certified to this Court.

alleged affiliation or membership in the Communist Party subsequent to the year 1936.

The Government's proof at the deportation hearing on the issue of Communist Party membership or affiliation was limited to the testimony of two paid informers, to the effect that they were members of the Party and knew the Petitioner as a member of the Young Communist League and of the Communist Party between 1929 and 1936; and that during a portion of this period he was "active" in the athletic programs of the Young Communist League, an "organizer" for the Party, and a member of the District Committee of the Young Communist League and Buro. Therefore, there is no testimony showing any alleged activity subsequent to 1936 and none showing any alleged activity other than that of a mere member, with no indication of the holding of any office or position of leadership in the party.

The final order of deportation was entered on or about June 4, 1953, and affirmed on or about August 19, 1953. The Bill of Complaint for judicial review of this order was filed on March 30, 1955. In his Complaint (App. 2a),[3] Petitioner contended that there was no competent evidence showing that he was within the class covered by the statute, that the hearing held pursuant to the warrant of deportation was not properly conducted and that the deportation order constituted a denial of due process in violation of the Fifth Amendment.

The District Court denied the relief sought in the Petitioner's Bill of Complaint (see attached opinion of Honorable Theodore Levin, District Judge, dated January 16, 1957). Upon appeal to the Circuit Court of Appeals for the Sixth Circuit, the same issues were raised and in its

[3] "App. ...." refers to the Appendix incorporated in Petitioner's Brief in the Court of Appeals and certified to this Court.

opinion, dated February 14, 1958, and attached hereto, the Court of Appeals affirmed the District Court's judgment. It is to be noted that in his Supplemental Brief filed with the Circuit Court of Appeals at its request, the Petitioner asked that the Court return the matter to the Immigration and Naturalization Service for the purpose of permitting him to introduce evidence showing that he comes within the rule in the *Rowoldt* case.

Thereafter and on March 17, 1958, the Circuit Court of Appeals entered an order staying its mandate pending the filing of this application for Writ of Certiorari.

On March 5, 1958, the Petitioner filed with the Board of Immigration Appeals a motion to reopen his deportation proceedings for the purpose of permitting the Petitioner to offer evidence to show the character of his membership in the Communist Party.

In making this request to the Board of Immigration Appeals, Petitioner called attention to the decision of January 3, 1958, by the Board, in *Matter of G., supra,* wherein the Board said:

> "* * * the case was tried prior to the decision of the Supreme Court in *Rowoldt v. Perfetto* * * * revealing that proof of voluntary membership in the Communist Party cannot create liability to deportation unless it is accompanied with proof that the affiliation of the alien member was with political implications. The necessity for the existence of political implications was not clear to administrative authorities prior to this decision * * *. No attempt was made to establsh this factor at the instant hearings * * *. We shall therefore order reopening of the proceedings so that the nature of the respondent's membership may be established."

His argument relating to this view was as follows:

> "Petitioner submits that the rationale of the Board's holding in the matter of G. require that his proceedings be reopened to permit him to offer proof negating any inference of 'political implications' based upon the evidence here that he was an organizer, attended high level conferences with District Officers of the Party, and attended closed meetings of the Party. This is the total of the Service's evidence concerning the character of the Petitioner's membership in the Party. Surely, if the Service is entitled to reopen because of a misapprehension of what it was required to prove, then Petitioner, laboring under the same misapprehension, is entitled to reopen for the purpose of disproving or explaining the above evidence and negating any inferences based thereon.
>
> And if this is to be done it would appear more appropriate that this should be done before Petitioner is required to appeal to the Supreme Court."

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS IN ITS ORDER AFFIRMING THE DEPORTATION OF THE PETITIONER DID NOT APPLY THE RULE OF THE ROWOLDT CASE, SUPRA, WHICH DEFINED THE SCOPE OF THE DECISION IN THE GALVAN CASE, SUPRA.

This Court in the *Galvan* case set forth as the test to be applied in determining whether Communist Party membership had been established for the purpose of deportation, the following:

> "There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an

organization known as the Communist Party which operates as a distinct and active political organization * * *.'" *Galvin v. Press*, 347 U. S. at page 528, 74 S. Ct. at page 741.

In applying what it considered to be the test laid down by this language the Board of Immigration Appeals and the lower Courts have repeatedly held that *any* proof of membership in the Communist Party was sufficient to sustain an order of deportation. (See language quoted from *Matter of G*, page 5, *supra*.) Thus it was sufficient for the Immigration Service to merely produce witnesses testifying, as here, that they had seen a person at so-called closed meetings of the Communist Party together with other similarly general statements as to activities. The Service was not required to produce proof of specific types of activities or that these activities had any political implications. That such a position was incorrect would seem clear on an analysis of the portion of the *Galvan* opinion quoted above. The alien had to commit himself to a course of action with a realization of the existence of certain facts. Yet the holdings of all of the Courts and of the Agency involved merely required the existence of membership in the Communist Party to permit deportation.

This Court then, in *Rowoldt v. Perfetto, supra*, restated the rule laid down in *Galvan, supra*, emphasizing the requirement of knowledge, and noting that the statement in *Galvan* to the effect that the deportee in that case did not have so nominal a relationship to the Communist Party as not to make him a member within the provisions of the statute, required that there be a showing of the nature and kind of relationship that any prospective deportee had to the Communist Party.

Thus, said the Court, there had to be a "substantial basis" for finding that an alien had a "meaningful association" with the Communist Party. Acting on this interpretation of the Statute, the Court noted that the three exculpatory situations contained in the Internal Security Act of 1950 and the 1951 Amendment thereto, were not exclusive but were merely "* * * illustrative of the spirit in which the rigorous provisions regarding deportability * * * are to be construed." *Rowoldt v. Perfetto supra,* at page 183.

The *Rowoldt* case then indicates that an economic reason for joining the Communist Party would prevent the application of the deportation provisions of the statute. Nothing in that case limits such exculpatory reasons to economic ones. In the instant case there is no evidence at all concerning the reasons and motives of the Petitioner in seeking membership and remaining a member. The testimony of the Government witnesses shows alleged activities in the Communist Party which could have been devoid of "political implications". At the time of the hearings only the issue of membership was thought to be important without any concern by either side of motives. On this basis there could be no advantage to the Petitioner in taking the witness stand, assuming that he was a member of the Communist Party, since all evidence other than the fact of membership would be irrelevant.

Now, as stated above, (*supra,* p. 5) Petitioner has requested the Board of Immigration Appeals to reopen his case for the purpose of permitting him to produce testimony of the type described above. No ruling has been made by the Board on this request. However, the Board has already ruled in *Matter of G., supra,* p. 5, that in cases of failure of proof *by the Service,* based upon the pre-

Rowoldt standard of proof, the Service can reopen the case to correct, if it can, its shortcomings in the record. If the Service is entitled to such consideration under the circumstances, then fairness, a rather important condiment in the due process pie, requires that the deportee be given a similar opportunity and that the matter be returned to the Service for the taking of such proofs as the respondent may have.

The Board of Immigration Appeals apparently concedes this point. In the *Matter of the deportation of Demetrious George Bojekos*, File A-3435783, the Board set aside the final order of deportation (which incidentally was before the District Court for the Eastern District of Michigan on a complaint for Judicial Review) on the grounds that "* * * the record does not show the extent of the respondent's activities in the Communist Party." and ordered the taking of testimony on this issue.

The motion in the *Bojekos* case was filed on March 14, 1958, while that in the instant case was filed on March 5, 1958. A decision was issued on April 10, 1958, in the former and none to this date in the latter.

In five cases pending before the United States Court of Appeals for the District of Columbia, the Department of Justice filed motions with the Board stating that the cases may be within the rule of the *Rowoldt* case and asking that the matters be remanded to the Service. The cases are *Estrada Salazar v. Rogers*, U. S. C. A., D. C. No. 13,015, *Remirez-Salse v. Rogers*, U. S. C. A., D. C. No. 12,852, *Emma and Warner Grondahl v. Rogers*, U. S. C. A., D. C. No. 13,158, and *Peyro v. Rogers*, U. S. C. A., D. C. No. 13,703.

There is no way to determine which cases the Board will reopen for additional testimony *and* which it will not, or in which cases the Department of Justice will concede the necessity for the reopening of cases. Certainly due process requires a uniformity of treatment. In the instant case we are not able to await the decision of the Board pending our filing this application, since the issue would probably be rendered moot by the deportation of the Petitioner while awaiting that decision.

This case should be returned to the Service with directions to permit the introduction of proofs to show whether or not the Petitioner's membership was devoid of any political implications. In the instant case there is no showing or allegation of recent activities on the part of the Petitioner which might relate to the Communist Party and no showing of the holding by the Petitioner of any position of leadership in the Communist Party at any time. Thus, the factual situation distinguishes this matter from *Galvan v. Press, supra* and from *Avromovich v. Lehmann*, 235 F. (2) 260, Cert. den. 78, S. Ct. 328, petition for rehearing denied 78, S. Ct. 363.

II.

THIS COURT SHOULD RECONSIDER THE CONSTITUTIONAL ISSUES DECIDED IN GALVAN v. PRESS.

In *Galvan v. Press, supra*, the Court upheld the Constitutionality of the Internal Security Act of 1950, against the charge that the act violated the due process clause of the Fifth Amendment, and the *ex post facto* and Bill of Attainder provisions of the constitution. One of the questions presented by the petition for Writ of Certiorari in *Rowoldt, supra*, was that the statute was unconstitu-

tional. This Court did not reach this question since its decision made it unnecessary.

The question of constitutionality must continue to face this Court and the brief filed with this Court by the Petitioner in *Rowoldt* states perfectly why *Galvan* should be overruled. We adopt the reasons contained in that brief without restating them.

The dissenting opinion in the *Rowoldt* case points out that the Court did not consider the constitutional issue and so it would clearly be erroneous to consider the majority opinion as a reaffirmation of the constitutional holdings of *Galvan*. The vigorous dissents in *Galvan* were made by members of this Court who were part of the majority in *Rowoldt*.

The Petitioner, therefore, submits that this case, on its facts requires a re-examination of the Constitutional issues raised but not decided in *Rowoldt*.

III.

THIS COURT SHOULD DETERMINE THAT THE CONDUCTING OF A HEARING WHICH COULD RESULT IN DEPORTATION, AND THE FINDING OF FACTS AND ISSUANCE OF ORDERS REGARDING DEPORTATION, BY A PERSON WHO IS AN EMPLOYEE OF THE IMMIGRATION AND NATURALIZATION SERVICE IS A DENIAL OF PROCEDURAL DUE PROCESS NOTWITHSTANDING THE DECISION IN MARCELLO v. BONDS.

This Court has repeatedly held, since the first flood of cases came to it regarding the procedures of the several regulatory and rule making agencies set up by Congress, that the agencies of Government which purported to hold hearings for the purpose of fact finding and the issuance of orders were required to afford to the participants much

the same procedural due process that the Constitution and the Common Law impose on the Courts of Law. The standards to be applied were outlined in the several *Morgan* cases.[1] In 298 U. S. at page 480 this Court held that a

> "* * * hearing is designed to afford a safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."

In the instant case we see the spector of an employee of a particular government agency, with duties and activities supervised by that agency, being designated as a Hearing Officer and later as a Special Inquiry Officer for the purpose of conducting a hearing on a Warrant of Deportation. It is contended by the Service that this person will be completely impartial and that the fact that he is an employee of the Service will not affect his decision. Nor will the fact that his offices are together with those of the department where he comes in daily contact with the investigators for the Service, with the so-called examining officer who acts as Counsel for the Service in the hearings, and finally with the witnesses who link an alien to the Communist Party and who also are employees, as here, of the Service. Here we have the situation at its most dramatic. The very Special Inquiry Officer who presided at these hearings, who made the findings of fact and conclusions of law and who ordered the petitioner deported, was subsequently placed in charge of the deportation sec-

[1] *Morgan v. United States*, 298 U. S. 468, 304 U. S. 1, 307 U. S. 183 and 313 U. S. 409.

tion of the Detroit Office of the Service and therefore he will supervise the actual deportation of the Petitioner.

How does this square with Justice Black's dissent in *Marcello v. Bonds*, 349 U. S. 302, when he says at page 318, "The idea of letting a prosecutor judge the very case he prosecutes or supervise and control the job of judge before whom his case is presented, is wholly inconsistent with our concepts of justice."

Where a department, which controls the future activities, promotions and even continued work of a trier of fact, appears before him as a litigant it is not difficult to conclude that it will be a most remarkable man who will not be effected. How could he not believe that if his decisions were not in accord with the desires of the department he serves, that he would not be placed at the head of the deportation section or receive any other promotion which might be available?

The majority opinion in *Marcello* does not answer the due process questions indicated above directly but rather states that the objection falls in the face of the "* * * long outstanding practice in deportation proceedings, judicially approved in numerous decisions * * *." Certainly mere repeated decisions on any issue, which decisions are contrary to established principles, do not make the first such decision, or the last, correct. This Court can correct mistakes and end injustice whenever it desires. What is suggested is a sort of waiver of due process requirements by repeated acquiescence in denials of those requirements. Without regard to the question as to whether such a waiver is ever possible, can the Petitioner's rights to hearing conducted in accordance with Constitutional requirements of due process be waived by anyone but himself? We think not.

The Court in *Marcello* also indicates that the Congress because of its "broad discretion in immigration matters" can adopt procedures which may not afford procedural due process. (See discussion on page 311 of *Marcello.*)

This is contrary, we believe, to the spirit of the Constitutional protection of procedural due process and contrary to the holdings in the *Morgan* cases, *supra.*

Finally this Court should re-examine the question raised in the dissenting opinion in *Marcello* as to whether the Administrative Procedure Act actually still applies in deportation cases.

Respectfully submitted,

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Dated: Detroit, Michigan,
April —, 1958.

OPINION OF COURT OF APPEALS

No. 13240

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARNOLD SCHLEICH, alias JOSEPH RING, *Appellant*, v. JAMES W. BUTTERFIELD, District Director of Immigration and Naturalization, etc., *Appellee*.	Appeal from the United States District Court for the Eastern District of Michigan.

Decided February 14, 1958.

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellant, Arnold Schleich, filed this action in the District Court seeking a review of a final order of deportation entered by the United States Immigration & Naturalization Service at Detroit, Michigan, on or about June 4, 1953, and affirmed by the Board of Immigration Appeals on August 19, 1953. The appellant, not being in custody, but having been ordered to report for deportation, also asked for temporary and permanent injunctions restraining the defendant-appellee, who was the District Director of Immigration & Naturalization in Detroit, from deporting the appellant or from molesting him pursuant to the deportation order. Jurisdiction exists under Section 1329, Title 8, U. S. Code. See: Section 10 of the Administrative Procedure Act, Section 1009(a) and (b), Title 5, U. S. Code; *Shaughnessy v. Pedreiro*, 349 U.

S. 48, 52; *Callow v. Lehmann*, 233 F. (2d) 859, C. A. 6th; *Muscardin v. Brownell*, 227 F. (2d) 31, C. A. D. C.

The appellant is a native of Germany, and an alien. He entered the United States in 1923 and has been a resident of Detroit for many years. On or about July 31, 1952, the appellee issued a warrant for appellant's arrest for the purpose of initiating deportation proceedings against him. The warrant alleged that appellant was an alien found in the United States in violation of the immigration laws thereof, in that he had been, after entry, a member of the Communist Party of the United States and an alien who was a member of a section, subsidiary, branch, affiliate or sub-division of the Communist Party of the United States, namely, "The Young Communist League." Act of October 16, 1918, as amended by the Internal Security Act of 1950, 64 Stat., 987, 1006, 1008. The substance of these provisions of the Internal Security Act of 1950 was subsequently incorporated in the Immigration and Nationality Act of 1952. Section 1251(a)(6)(C), Title 8, U. S. Code, effective December 24, 1952, Section 1101, Note, Title 8, U. S. Code. Following an administrative hearing, the Special Inquiry Officer of the Immigration & Naturalization Service found that the appellant was an alien who was "a voluntary member of the Communist Party of the United States from 1933 to the end of 1936" and "a voluntary member of an affiliate of the Communist Party, the Young Communist League, from 1929 to 1934." The order of deportation followed.

The appellant contends in this action (1) that the evidence was not sufficient to establish that he was a member of or affiliated with the Communist Party within the meaning of the statute, (2) that the statutory provision authorizing deportation under which he has been ordered deported is unconstitutional, and (3) the fact that the Special Inquiry Officer was an employee of and under the control of

the agency which instituted and conducted the proceedings against the appellant constituted a denial to him of due process of law. These contentions were rejected by the District Judge who sustained appellee's motion for a summary judgment. *Schleich v. Butterfield*, 148 F. Supp. 44, E. D., Mich.

The appeal from that ruling was argued before this court prior to the recent decision of the Supreme Court in *Rowoldt v. Perfetto*, December 9, 1957. At the time of the argument appellant recognized the weakness of his contentions under the rulings of the Supreme Court in *Galvan v. Press*, 347 U. S. 522, and *Marcello v. Bonds*, 349 U. S. 302. He relied largely upon the possibility that these rulings would be changed or modified by the ruling being awaited in *Rowoldt v. Perfetto* which had been argued and submitted but not then decided. We now have the ruling in *Rowoldt v. Perfetto*. The issues raised by the second and third contentions of the appellant, above set out, are not discussed in the opinion. Accordingly, the contentions with respect to the constitutionality of the statute and lack of due process in the hearing are rejected upon the authority of *Galvan v. Press, supra*, and *Marcello v. Bonds, supra*. This leaves for consideration only appellant's first contention that there was not sufficient competent evidence to establish that the appellant was a member of or affiliated with the Communist Party within the meaning of the statute.

On this issue it was held in *Galvan v. Press, supra*, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. The Court said, "It is enough that the alien join the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that

he did so of his own free will." The Court also held that the Internal Security Act of 1950 dispensed with the necessity of proving in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate violent overthrow of the Government. At the same time, the Court indicated that a person's relationship to the Communist Party might be so nominal, even though technically a member, as not to make him a "member" within the terms of the Act. In that case the petitioner disclosed that he had joined the Communist Party of his own free will, giving the time and place of doing so and indicating generally that the distinction between the Party and other groups was clear in his mind. There was also evidence that he had been elected an officer of the Spanish Speaking Club, an alleged Communist Party unit. The Court held that this evidence was sufficient to support a finding of membership and affirmed the order of deportation.

In *Rowoldt* the Court again considered what constituted membership in the Communist Party. In that case the petitioner was an alien who entered the United States in 1914. He stated that he joined the Communist Party in the spring or summer of 1935, paid dues, attended meetings and remained a member until he was arrested in the deportation proceedings, which was at the end of 1935, and that he was probably a member for approximately one year, that he had no job, that everybody around him had the idea that they had to fight for something to eat and clothes and shelter, that they were not thinking of overthrowing anything but wanted something to eat and something to crawl into. He also worked for a while as a salesman in a bookstore run by the Communist Party but stated that he "didn't get a penny there." The Court said that bearing in mind the solidity of proof that is required for a judgment

entailing the consequences of deportation, it could not say that such evidence established the kind of "meaningful association" required by the Internal Security Act of 1950 as amended; that in light of such evidence, the dominating impulse to his "affiliation" with the Communist Party may well have been wholly devoid of any "political" implications. The judgment of deportation was reversed, four members of the Court dissenting.

Rowoldt v. Perfetto did not change the law with respect to the proof necessary to show membership in the Communist Party. *Galvan v. Press* was recognized as the controlling authority. The different ruling was the result of different factual situations. The Court closed its opinion in the *Rowoldt* case by saying, "The differences on the facts between *Galvan v. Press*, *supra*, and this case are too obvious to be detailed."

In the present case the Government produced two witnesses, Pace and Nowell, who had been active members of the Communist Party for many years. They positively identified Schleich as being a member of the Young Communist League and the Communist Party between 1929 and 1936. Pace testified about being at thirty or more closed meetings of the Communist Party and its agencies at which Schleich was present. Nowell testified of his association with Schleich in at least one hundred and fifty closed party meetings. He told of seeing Schleich's name on the membership rolls of the Party. These witnesses also testified about the activities of Schleich in the Communist Party, his acceptance of important assignments as an organizer in recruiting young people and farmers for the Communist cause, and in attending high level conferences with district officers in which he related his activities and received instructions. Although their testimony was limited to the years 1936 and prior thereto, the evidence does not show

that Schleich left the Party in 1936 or at any time subsequent thereto. Schleich did not testify in the proceeding or introduce any evidence to show that his relationship to the Party was merely nominal rather than substantial. Certainly, there is nothing in the record to show that he did not join the Party of his own free will or that he was mistaken about the nature and purposes of the Party at the time of joining and thereafter. His years of membership and active participation in organization work compel the opposite conclusion.

In our opinion, the foregoing evidence was sufficient to establish the "meaningful association" with the Party, referred to in the *Rowoldt* case, and to show that Schleich joined the Party, aware that he was joining an organization known as the Communist Party which operated as a distinct and active political organization and that he did so of his own free will, which, according to the rule laid down in *Galvan v. Press, supra*, 347 U. S. 522, 528, was enough to constitute him a "member" within the terms of the Act.

The judgment is affirmed.

OPINION OF DISTRICT COURT

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

ARNOLD SCHLEICH, alias JOSEPH RING, *Plaintiff*,	
JAMES W. BUTTERFIELD, District Director of Immigration and Naturalization at Detroit, Michigan, *Defendant*.	Civil Action No. 14220.

The plaintiff in this action, a native of Germany and an alien, is seeking judicial review of an order of deportation. There are no factual issues involved and the defendant has moved for summary judgment.

The plaintiff was ordered deported after a hearing held in Detroit, Michigan on January 9, 1953. The Special Inquiry Officer of the Immigration and Naturalization Service found, which findings were approved by the Board of Immigration Appeals, that the plaintiff entered the United States in 1923; that he was a member of the Communist Party of the United States from 1933 to 1936; and that he was a member of the Young Communist League from 1929 to 1934. Neither the plaintiff nor anyone else offered themselves as witnesses in his behalf.

Under 8 U. S. C. A., Sec. 1251(a)(6)(C), as amended, 1952, aliens who at any time after entry were members of the Communist Party of the United States, or of any

"section, subsidiary, branch, affiliate, or subdivision" of the Communist Party of the United States, are deportable.

The plaintiff alleges that he has been denied the process of law in that the record fails to show that the officers who conducted the proceedings were eligible under, and designated according to, the Administrative Procedure Act. No defect is apparent on the face of the record and plaintiff specifies none. The activities of the governmental officials are therefore presumed to have been regular. *Reines v. Woods*, 192 F. 2d. 83 (Emerg. App. 1951).

Plaintiff also contends that he was denied due process because the Inquiry Officer and the Examining Officer, as employees of the same governmental agency, were subject to common control. Thus, plaintiff claims that his judge and prosecutor were essentially one person. This arrangement has been held not to deprive a person of due process. *Marcello v. Bonds*, 349 U. S. 302, 311 (1955):

> "As noted above, the only complaint which petitioner can urge concerning the hearing procedures in this case is the objection that the special inquiry officer was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions. Petitioner would have us hold that the presence of this relationship so strips the hearing of fairness and impartiality as to make the procedure violative of due process. The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters."

The Supreme Court has also held that the retroactive nature of the deportation does not violate due process of law. *Galvan v. Press*, 347 U. S. 522, 530 (1954):

> "In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.
>
> "But the slate is not clean. As to the extent of the power of Congress under review there is not merely 'a page of history,' *New York Trust Co. v. Eisner*, 256 U. S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U. S. 86, 101; *Wong Yang Sung v. McGrath*, 339 U. S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.
>
> "We are not prepared to deem ourselves wiser or more sensitive to human rights than our pre-

> decessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See *Bugajewitz v. Adams*, 228 U. S. 585, and *Ng Fung Ho v. White*, 259 U. S. 276, 280."

A holding of the Supreme Court is, of course, a mandate upon me and I am not permitted to anticipate that the court may hold otherwise if the question were presented to it at this time. "If the question is to be reopened the Supreme Court must open it."[1]

Plaintiff also urges that there is no evidence of anything more than "nominal" membership for which plaintiff is not deportable under the *Galvan* case. The testimony indicates, however, that the plaintiff was an active member of the Communist Party of the United States and the Young Communist League for several years. There is also testimony that the Young Communist League was a section of the Communist Party of the United States.

The entire evidence of the Government against the plaintiff was given by two informers, one who stated he testified in "5 or 6" similar cases and the other testified that he appeared as a witness in "25 or 30" similar cases. They also stated that they were paid by the Department of Justice for such services. The plaintiff urges that the testimony given by such "professional witnesses", ought not to be given any weight, particularly in a proceeding which may result in the banishment from

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[1] Judge Learned Hand, speaking for the court in *United States v. Rebhuhn*, 109 F. 2d 512, 514 (C. A. 2d 1940).

the United States of a man who has lived here for thirty-three years and who, even under the Government charges, has not been identified with the Communist Party or its affiliates for over twenty years. But the examining officer and his reviewing authority considered the evidence of such witnesses credible and I may not set aside the finding of credibility.

The motion for a summary judgment is granted.

Theodore Levin,
United States District Judge.

Dated: Detroit, Michigan,
January 16, 1957.

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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARNOLD SCHLEICH, ALIAS JOSEPH RING, PETITIONER

v.

JAMES W. BUTTERFIELD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT DETROIT, MICHIGAN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 15) is reported at 252 F. 2d 191. The opinion of the District Court (Pet. 2) is reported at 148 F. Supp. 44.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1958 (Pet. 15). The petition for a writ of certiorari was filed on April 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the alien was properly ordered deported on proof that he was an active member and organizer of youth in the Communist Party for a period of approximately seven years.

2. Whether this Court should reconsider its decisions in *Galvan* v. *Press*, 347 U.S. 522, and *Marcello* v. *Bonds*, 349 U.S. 302.

STATEMENT

Petitioner, a native of Germany, sought judicial review in the United States District Court for the Eastern District of Michigan of an order directing his deportation on the ground that he had been, after entry, a member of the Communist Party. The District Court granted the motion of the government for summary judgment (R. 8, 9-12), and the Court of Appeals affirmed.

1. The evidence as to petitioner's membership in the Communist Party was established by the testimony of two witnesses, Pace and Nowell, who were themselves important Party functionaries active in the Detroit area between the years 1929-1936.

Pace testified that he met petitioner in a Party headquarters in 1931 (TR 19). Petitioner at that time was assigned to organize youth in the Party's Labor Sports Union (TR 20, 21). Pace worked with him in this activity (TR 21), seeing him two or three times a week (TR 46). During that year, Pace saw petitioner at five or six closed District Committee

meetings of the Young Communist League[1] (TR 20). In 1933, Pace was present at a meeting of the District Buro when petitioner was appointed as an organizer of farm youth (TR 48, 23). During the years 1933-1934, he saw petitioner at from twenty-five to thirty closed meetings of the District Committee of the Communist Party (TR 22-23).

Nowell testified that he met petitioner in 1929 in the District Party office at a closed meeting to which only functionaries and others in strategic work were invited (TR 62, 63). He saw petitioner at at least one District convention (TR 64). During the years 1929-1931, he saw petitioner at twenty or twenty-five closed meetings of the Young Communist League (TR 64). He knew petitioner as a member of the District Committee of the League and a Buro organizer of the Labor Sports Union (TR 20, 65). During the years 1933-1936, Nowell saw petitioner present at, "conservatively", one hundred and fifty closed membership and functionary meetings of the Communist Party where he reported, discussed experiences, and received instructions (TR 67-68, 72). Nowell was a member of the District Buro at the time petitioner was assigned to do organizational farm work (TR 69-70). He often saw petitioner's name on the Party's membership rolls and had many conversations with him (TR 70-71).

---

[1] The Young Communist League was described as a youth section of the Communist Party committed to the recruitment and training of youth for the movement and to agitation against war (TR 17, 66).

Petitioner offered no testimony in rebuttal but requested and was granted an adjournment to permit a study of the evidence (TR 108). When the hearing resumed on March 23, 1953 (TR 111), petitioner advised that he would rest on the record as it stood. He renewed a motion he had made at the outset of the hearing to quash the warrant as violative of the First and Fifth Amendments and Section 9 of Article 1 of the Constitution (TR 5, 111).

On June 4, 1953, the hearing officer concluded that petitioner was deportable, finding that he had been a voluntary member of the Young Communist League from 1929 to 1934 and of the Communist Party from 1933 to 1936. Before the Board of Immigration Appeals, petitioner urged bias on the part of the hearing officer.[2] The Board dismissed the appeal on August 19, 1953, holding that the findings and conclusions of the officer were based solely upon the record and upon substantial probative evidence.

2. After the decision of the Court of Appeals in this case on February 14, 1958, petitioner, on March 7, 1958, applied to the Board of Immigration Appeals for a reopening of his cause to permit him to introduce evidence which, he claimed, would show that his party membership was not meaningful. A copy of the motion is annexed as Appendix A, *infra*, pp. 9-13. On July 16, 1958, the Board of Immigration Appeals denied the application, setting forth its reasons in an opinion, a copy of which is set forth in Appendix B, *infra*, pp.

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[2] At the outset, petitioner had questioned the authority of the immigration officers to act (TR 6).

14-17.[3] The Board found that the evidence of record was sufficient to establish that petitioner's association with the Communist Party was meaningful, and also found that nothing had been submitted on behalf of petitioner to indicate that any change of decision was warranted. The Board noted that, under regulation 8 C.F.R. 6.21, a motion to reopen must be supported by affidavits or other evidentiary material. The motion filed by petitioner's counsel (see Appendix A, *infra*, pp. 9-13) contained no evidentiary material but merely a statement that petitioner would testify as to reasons for joining and remaining a member (*infra*, p. 11).

ARGUMENT

1. The record in this case shows petitioner to have been an active member of the Young Communist League and the Communist Party for seven years. He attended high level conferences and actively participated in recruiting young people and farmers for the Communist cause. See the Statement, *supra*; pp.

[3] Previously, on April 23, 1958, the Board of Immigration Appeals had denied the application to reopen on the ground that the record was not before it. After the petition for a writ of certiorari had been docketed in this Court, petitioner, with the consent of the government, applied to this Court for leave to withdraw the immigration record so that the reopening application could be considered on its merits by the Board of Immigration Appeals. On June 2, 1958, the Court granted the motion and provided that, if the decision of the Board was adverse to petitioner, the government's time to answer the petition for a writ of certiorari would be extended until 30 days after the decision. 356 U.S. 971. This brief in opposition to certiorari is being filed pursuant to that order.

2-3. This was clearly meaningful membership within the decisions of this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and *Galvan* v. *Press*, 347 U.S. 522, 528.

The petition for certiorari (filed on April 28, 1958) for the most part seeks to have the cause remanded to the immigration authorities to afford petitioner an opportunity to present evidence, particularly his own testimony, which he deliberately declined to produce at the original hearings, *supra*, p. 4. Petitioner has now had that opportunity to the extent that his application to reopen was considered by the Board of Immigration Appeals, but, as the Board properly found, he has failed to make a proper showing that he could negate the proof of voluntary and meaningful association established by this record. In his motion to the Board to reopen, petitioner merely stated that he would give testimony as to his "reasons and motives" in joining the Communist Party and remaining a member thereof, and his belief that there was no legal proscription against membership (see *infra*, p. 11).[4] But, aside from the cardinal fact that petitioner did not undertake to furnish an affidavit as to what such testimony would be or to give the details of the proffered testimony (as the regulations required), a mere statement of motive would not tend

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[4] Petitioner also offered to prove that he had not engaged in Communist activities for fifteen years prior to his arrest on the warrant of deportation. This is a factor which could be considered on an application for suspension of deportation, but does not render petitioner non-deportable under the statute. *Galvan* v. *Press*, 347 U.S. 522.

to show that he was not a voluntary member of a distinct and active political organization. As the court below pointed out, the *Rowoldt* case did not change the rule of *Galvan* v. *Press*, *supra*, that the government need not, under the statute, show that the alien knew of the advocacy of violent overthrow of the government by the Communist Party (see Pet. 19).

2. Petitioner also asks this Court to reconsider its decision in *Galvan* v. *Press*, 347 U.S. 522, as to the constitutionality of the statute providing for deportation of past Communist Party members, and the decision in *Marcello* v. *Bonds*, 349 U.S. 302, as to the constitutional validity of the procedure in deportation hearings. He offers no arguments which were not before the Court when those cases were decided and presents no new material warranting reconsideration.[5]

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[5] At its last Term, after the decision in the *Rowoldt* case, *supra*, the Court denied certiorari in cases challenging the constitutionality of the statute and asking for the overruling of *Galvan*. *United States ex rel. Avramovich* v. *Lehmann*, 355 U.S. 905; *Niukkanen* v. *Boyd*, 355 U.S. 905; see also *Jimenez* v. *Barber*, 355 U.S. 903; *Rystad* v. *Boyd*, 355 U.S. 912.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

AUGUST 1958.

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

MOTION TO REOPEN PROCEEDINGS

FILE NO. A 4564405—Detroit

IN RE: ARNOLD SCHLEICH, alias
JOSEPH RING,

IN DEPORTATION PROCEEDINGS.

TO THE BOARD OF IMMIGRATION APPEALS:

Petitioner, by his undersigned counsel, respectfully moves the Board to reopen the deportation proceedings against Petitioner. In support of this motion, Petitioner shows as follows:

1. Since the date of the final Order herein, and on February 14, 1958, the Court of Appeals for the Sixth Circuit has affirmed the Order of Deportation.

2. Petitioner has filed with the Circuit Court of Appeals for the Sixth Circuit a petition for stay of execution of the judgment pending filing of a petition for a writ of certiorari to the Supreme Court of the United States.

3. Petitioner believes that his case presents substantial issues which merit consideration by the Supreme Court of the United States including the following:

I. In the light of the standard of proof imposed upon the Immigration Service by the decision of the Supreme Court in *Rowoldt*, supra, can it be said, upon the record here, that the proofs presented by the Service on the question of the character of Petitioner's alleged Communist Party membership, measure up to that standard?

II. Whether, notwithstanding the decision of the Supreme Court in *Galvan*, supra, the statute providing for deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case?

III. Does not the Fifth Amendment's requirement of due process demand that, at a minimum, Petitioner's case be remanded to the Service with leave to Petitioner to present evidence bringing his alleged membership within the boundaries of the *Rowoldt* opinion?

4. Petitioner has also recently learned of the recent decision of the Board of Immigration Appeals made on January 3, 1958, in the matter of *G.*, File No. A 524774, wherein the Board said:

> ". . . the case was tried prior to the decision of the Supreme Court in *Rowoldt v. Perfetto*, . . . revealing that proof of voluntary membership in the Communist Part cannot create liability to deportation unless it is accompanied with proof that the affiliation of the alien member was with political implications. The necessity for the existence of political implications was not clear to administrative authorities prior to this decision. . . . No attempt was made to establish this factor at the instant hearings. . . . We shall therefore, order reopening of the proceedings so that the nature of the respondent's membership may be established."

5. Petitioner submits that the rationale of the Board's holding in the matter of G, require that his proceedings be reopened to permit him to offer proof negating any inference of "political implications" based upon the evidence here that he was an organ-

izer, attended high level conferences with District Officers of the Party, and attended closed meetings of the Party. This is the total of the Service's evidence concerning the character of the Petitioner's membership in the Party. Surely, if the Service is entitled to reopen because of a misapprehension of what it was required to prove, then Petitioner, laboring under the same misapprehension, is entitled to reopen for the purpose of disproving or explaining the above evidence and negating any inferences based thereon.

And if this is to be done it would appear more appropriate that this should be done before Petitioner is required to appeal to the Supreme Court.

6. At a reopened hearing, Petitioner would show and now offers to show the following facts, raising issues not heretofore considered by this Board. Petitioner will show that:

(a) In joining and remaining a member of the Communist Party, Petitioner did so under the mistaken belief, held by him in good faith, that there was no legal proscription against such membership;

(b) Prior to the time of his arrest by the Immigration Service in July, 1952, Petitioner had voluntarily discontinued all membership or affiliation with the Communist Party and he has not engaged in any Communist Party activity for more than fifteen years;

(c) The reasons and motives of the Petitioner in seeking membership in the Party and for remaining such a member. Such evidence to be given by the Petitioner himself.

7. Assuming the above evidence (which Petitioner would have presented, but for his misapprehension as to the requirements now set forth in *Rowoldt*), the

administrative authorities here are required to determine in the first instance:

(a) Does the record, as thus supplemented by the above additional facts, establish by a "solidity of proof" that Petitioner voluntarily joined or committed himself to the Communist Party and with consciousness that he was doing so?

(b) Where, as here, an alien joins and maintains membership in the Communist Party is there any substantial basis for a finding that such membership was of the character proscribed by the deportation statute as interpreted in *Rowoldt*, supra?

WHEREFORE, Petitioner requests that his deportation proceedings be reopened for the above purposes and that he be permitted to testify concerning the matters described above.

Respectfully submitted

BERNARD J. FIEGER
Attorney for Petitioner
1256 National Bank Building (26)
WOodward 1-0737

Dated: Detroit, Michigan.

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

ARNOLD SCHLEICH, being duly sworn, deposes and says that he is the Petitioner herein; that he has read the foregoing Motion to Reopen Proceedings and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein

stated to be on information and belief, and as to those matters, he believes it to be true.

ARNOLD SCHLEICH

Subscribed and sworn to before me
this day of March, A.D. 1958.

Julie Ann Lesnoff

Notary Public, Wayne County, Mich.
My Commission Expires Apr. 13, 1958

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
July 16, 1958

File: A-4564405—Detroit

In re: ARNOLD SCHLEICH alias JOSEPH RING

IN DEPORTATION PROCEEDINGS
MOTION
ON BEHALF OF RESPONDENT:

BERNARD J. FIEGER, Esquire
1256 National Bank Building
Detroit 26, Michigan

CHARGES:

Warrant: Act of 1918—After entry, member of Communist Party of the United States (137, 8 USC)

Act of 1918—After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States, to wit: The Young Communist League (137, 8 USC)

Lodged: None

APPLICATION: Reopening

This case is before the Board pursuant to counsel's motion received at the Detroit, Michigan office of the Service on March 7, 1958 requesting that the outstanding order and warrant of deportation be withdrawn and further requesting reconsideration and reopening of the proceedings for the purpose of de-

termining the nature of the respondent's membership in the Communist Party of the United States in light of the decision of the Supreme Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115. This case was before this Board on August 19, 1953, at which time we dismissed the appeal from the order entered by the special inquiry officer directing that the respondent be deported from the United States pursuant to law on the grounds set forth above.

The respondent, a 54-year-old male, native and last a citizen of Germany, has resided continuously in the United States since his admission for permanent residence at New York, New York on June 7, 1923. The record reflects that the respondent was an affiliate of the Communist Party, to wit, the Young Communist League from 1929 to 1934 and that he was a voluntary member of the Communist Party of the United States from 1933 to the end of 1936. He has been found and is subject to deportation on the grounds designated above. It is not deemed necessary to discuss in detail the remaining facts in this case, inasmuch as they have been heretofore fully covered by the special inquiry officer and this Board in their respective decisions of June 4 and August 19, 1953.

The respondent's motion seeking reopening and reconsideration is predicated upon the decision of the Supreme Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115 decided on December 9, 1957. The precise issue present in the respondent's case was before the Court of Appeals for the Sixth Circuit on February 14, 1958, at which time the court considered and rejected the several contentions advanced by counsel on motion (252 F. 2d, 191).

There are so many distinguishing factors between the instant case and the Rowoldt case, supra, that the latter case has no application. The record reflects that

respondent was a voluntary member of the Young Communist League from 1929 to 1934. Likewise, he was a voluntary member of the Communist Party of the United States from 1933 to 1936. The respondent's association with and participation in the communist movement in the United States lasted for a period of at least seven years. Moreover, two witnesses testified as to the respondent's membership in the Communist Party of the United States and the Young Communist League and as to his active participation in the program of the aforementioned organizations. In the Rowoldt case, the alien was a member of the Communist Party for less than a year. It appears that he joined the Communist Party to get something to eat as well as clothes and shelter. The court in *Rowoldt* v. *Perfetto* concluded that Rowoldt's membership in the Communist Party may have been devoid of any political implications and that there was absent a "meaningful association." Moreover, *Rowoldt* v. *Perfetto* did not change the law with respect to the proof necessary to show membership in the Communist Party. *Galvan* v. *Press*, 347 U.S. 522 is recognized as the controlling authority. In the latter case the court held that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. The court said that "it is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as the distinct and active political organization, and that he did so of his own free will."

The evidence present in the instant case is sufficient to establish a "meaningful association" by the respondent with the Communist Party of the United States and to show that he joined the Communist

Party, aware that he was joining an organization known as the Communist Party, which operated as a distinct and active political organization, and that he did so of his own free will. A motion to reopen must be supported by affidavits or other evidentiary material as well as setting forth the facts to be proved at the reopened hearing (8 CFR 6.21). Nothing has been submitted on behalf of the respondent to indicate that any change in the Board's prior decision is warranted. We have carefully considered all the evidence of record together with counsel's representations on motion and as a consequence thereof we find that the evidence of record is sufficient to establish a "meaningful association" by the respondent with the Communist Party of the United States and that such association was established by reasonable, substantial and probative evidence. For the reasons stated, the following order will be entered.

ORDER: It is ordered that the motion be denied.

Chairman